U.S. Department of Labor

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Issue Date: 04 January 2006

CASE NO.: 2005-LHC-00521

OWCP No.: 02-132978

In the Matter of

VICTOR MANCINI,
Claimant

v.

HOWLAND HOOK CONTAINER TERMINAL,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN., LTD.,
Carrier

Appearances: Philip J. Rooney, Esquire
For Claimant

Robert N. Dengler, Esquire
For Employer/Carrier

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "LHWCA" or the "Act"), and the regulations promulgated thereunder.

I. BACKGROUND

A. Procedural History

This matter was referred to the Office of Administrative Law Judges ("OALJ") on December 7, 2004. By Notice of Hearing dated December 23, 2004, I scheduled a hearing on this matter for April 27, 2005, in New York, New York. On March 1, 2005, Claimant moved to compel Employer/Carrier to comply with demand for discovery. Claimant also requested to take the deposition of Claimant's treating physician, Dr. Sudha Patel, by post-hearing deposition. By

letter dated March 14, 2005, Employer opposed Claimant's Motion to Compel Discovery, and Claimant withdrew his motion at the hearing. At the hearing, I granted Claimant's motion for extension of time to submit deposition testimony. On March 30, 2005, Employer submitted its pre-hearing statement.[1] On April 4, 2005, Claimant submitted its first list of exhibits.[2]

The hearing was held as scheduled and testimony was given by two witnesses: Victor Mancini (the Claimant) and John D. Atkins.[3] Claimant submitted nine exhibits and Employer submitted thirteen exhibits into the record.[4] On June 23, 2005, the parties jointly requested that the evidentiary record be left open until July 31, 2005, and further requested that post-hearing briefs not be due until August 31, 2005. I granted this request for an extension. On July 27, 2005, Employer notified me that the deposition of Employer's orthopedic expert was postponed and requested an extension of the post-hearing deposition period and extension of the deadline for the submission of post-hearing briefs. As Claimant did not oppose the motion, I extended the time for submissions to August 1, 2005. On August 29, 2005, because of delays in receiving the deposition transcripts from the court reporter, another extension was requested, and the deadline was set for September 30, 2005.

On September 23, 2005, Employer submitted the deposition transcripts of Dr. Kenneth Seslowe, Dr. Melvin Vigman, Dr. Lawrence Miller, and Mr. Joseph Lopez into evidence.[5] On September 26, 2005, Claimant submitted the report of Dr. Ashok Anant[6] and the deposition transcript of Dr. Sudah Patel.[7] At that time, Claimant also requested a two week extension for submission of his post-hearing brief. Both parties finally submitted their respective post-hearing briefs on October 14, 2005.[8]

B. Stipulations of the Parties

The parties stipulated to the following facts, which were read into the record by counsel for Employer:

1. This claim is subject to the LHWCA.
2. Claimant and Employer were in an employer-employee relationship at the time of the accident that is the subject of this claim.
3. The accident occurred on March 29, 2003 in New York.
4. Employer was timely notified of Claimant's accident.
5. Employer timely filed a first report of injury (form LS-202) with the United States Department of Labor ("DOL").

[1] The following citation is used herein: "EPS at _" denotes Employer's pre-hearing statement of March 30, 2005.
[2] Claimant's first list of exhibits consists of nine exhibits which correspond directly with Claimant's exhibits one through nine that it submitted at the April 27, 2005 hearing.
[3] The following citation is used herein: "Tr. at _" denotes the transcript of the April 27, 2005 hearing.
[4] The following citations are used herein: "CX.-1" through "CX.-9" denotes Claimant's exhibits and "EX.-1" through "EX.-13" denotes Employer's exhibits.
[5] These deposition transcripts are cited as "EX.-14" through "EX.-17," respectively.
[6] Cited as "CX.-10."
[7] Cited as "CX.-11."
[8] The following citations are used herein: "CB. at _" denotes Claimant's post-hearing brief and "EB. at _" denotes Employer's post-hearing brief.

6. Carrier timely filed a Notice of Controversion with the DOL.
7. Claimant's average weekly wage is $2,359.96.
8. Carrier paid Claimant total temporary disability ("TTD") compensation benefits from March 31, 2003 through June 30, 2004 at the weekly compensation rate of $996.54, the maximum compensation rate in effect on the accident date.[9]
9. Carrier provided medical benefits in accordance with Section 7 of the LHWCA.

Tr. at 8-9; CB. at 1; EB. at 2-4.

C. Contentions of the Parties

1. Claimant

It is undisputed that Claimant was injured in a work-related accident at Howland Hook on March 29, 2003, and that he was paid total temporary disability benefits by Employer for the period from March 31, 2003 through June 30, 2004. Employer contests Claimant's assertion that he remains totally disabled and is entitled to total disability payments under the LHWCA. Claimant argues that the medical evidence demonstrates that he continues to be permanently disabled because he is not capable of performing his pre-injury work as a longshoreman and Employer has failed to establish that he is capable of performing suitable alternative employment.

2. Employer

Employer contends that Claimant is exaggerating his current symptoms. Employer provided for Claimant's medical treatment and paid him temporary total disability ("TTD") benefits for an injury that Claimant sustained on March 29, 2003, and which Employer argues has resolved. Employer argues that Claimant lacks credibility and is fabricating and exaggerating his medical complaints. Employer further argues that regardless of the veracity of Claimant's complaints, Claimant is able to return back to work and has simply chosen not to. In the alternative, Employer argues that there is other employment that Claimant can perform. Tr. at 15-18. Employer also argues entitlement to special fund relief under Section 8(f) of the LHWCA if Claimant is found to be disabled.

D. Issues for Adjudication

The issues presented for resolution in this case are as follows:

1. Is Claimant capable of returning to his usual work as a longshoreman?
2. If Claimant is unable to return to his usual work as a holdman, has Employer established that he is capable of performing suitable alternative employment?
3. Does the record support a finding that Claimant suffers from a permanent disability, and if so, what is the date of permanency?

[9] Carrier deducted eleven paid holidays this during this period. Claimant's counsel, just prior to the formal hearing, challenged these deductions, and Carrier agreed to reimburse Claimant for these eleven days. This payment has been made. EB. at 3, fn. 3.

4. If Claimant is found to be disabled under the LHWCA, is Employer/Carrier entitled to special fund relief under Section 8(f) of the Act?

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Testimonial Evidence

1. Claimant's Testimony (Tr. at 19-77)

Victor Mancini, the Claimant, testified that he was born on March 3, 1940 in Mola, di Bari, Italy, where he attended four or five years of schooling. Tr. at 20. He came to the United States on January 2, 1966 and first worked in a factory before going to work on the docks. Tr. at 20.

Claimant stated that he speaks very little English. Tr. at 21. Claimant testified without an interpreter at a deposition held on February 16, 2005. Tr. at 21; EX.-13). However, Claimant asked for an interpreter at the hearing because "what we did [during the deposition] I couldn't understand too good and if I don't hear too good, I want to be sure." Tr. at 21. Claimant can understand some words in English that he learned at his workplace but he cannot write in English. Tr. at 22.

Claimant's testimony about his work history is confusing. He said that he began working on the Brooklyn waterfront in the hold of ships in 1966 when he was twenty-six years old. Tr. at 22-23. That pier eventually closed and Claimant worked with the Guarantee for a few years. Tr. at 23. Claimant first testified that he began working steadily at Howland Hook (the "Employer") in 1966. Tr. at 24. He testified that he has worked at Howland Hook for "36, 37" years. Tr. at 24. But he testified that he worked at the Brooklyn terminal for "23, 24 years." Tr. at 25. Claimant then testified that he started working at Howland Hook "well, maybe six, seven, eight years." Tr. at 27.

Although Claimant was unclear about when he first began working steadily at Howland Hook, he was certain that he began his work as a hustler driver. Tr. at 28. He also worked as a holdman. Tr. at 30. A holdman has to "go down the hold to remove the shoes and put the shoes to put the container on and then, many times, you have to put the shoes or remove the shoes, bend, get up, walk. Many movements." Tr. at 30. The shoes "lock the container one on top of the other" and weigh about "25 – 30 pounds." Tr. at 30. Claimant also worked as a laborer. Tr. at 32. A laborer at Howland Hook has to lift things such as "coffee…banana boxes…rocks" and load it. Tr. at 32.

On March 29, 2003, the day Claimant was injured, he was working in a gang "to put shoes to load and unload the containers." Tr. at 34. Claimant was injured onboard a ship. Tr. at 34. It is difficult to ascertain from his testimony the exact manner in which Claimant was hurt, but I have gleaned that an accident occurred as the result of improper operation of a "spreader" by one of his co-workers. Tr. at 35. When asked what parts of his body he hurt, he testified that

he "got hurt on the back and the neck and [he] was all broken. Blood all over." Tr. at 35. Claimant's testimony on the subject is generally disorganized:

> Q: Sir, can you tell me in words what part of your body you hurt?
>
> A: It hurts me on the spine, right here, the leg. The right one is less, but the left one is the one that hurts. And then, here, when I turn my head, I have pain on my head.
>
> Q: Sir, right now, we're asking you what parts of your body you hurt on that day.
>
> A: The spine and the legs. There was blood all over here and the knee and the back one.
>
> Q: Did you hurt your low back, sir?
>
> A: Forget about it. Yes.
>
> Q: I heard that one. Sir, did you hurt the right side of your back, the left side of your back? What part of your back?
>
> A: The left –
>
> Q: Sir –
>
> A: and the left leg. As I walk for a little, I don't feel it anymore.
>
> Q: That's okay. Sir did you hurt any other part of your body besides your low back?
>
> A: Here on the shoulder and it goes down to the neck, and then I have pain in my neck.

Tr. at 36-37.

After Claimant was injured, he sought treatment at Victory Memorial Hospital in Brooklyn. Tr. at 37. He told the doctors there that he hurt his "whole back, the leg and the neck." Tr. at 37. He then consulted his treating physicians, Drs. Antonio Parisi and Sudha Patel. Tr. at 37-38. X-rays were taken at their office. Tr. at 37.

Claimant stopped working the day he was injured, March 29, 2003, and has not returned to the job since. Tr. at 39. When asked if he was able to return to work at Howland Hook, the Claimant replied: "I wish I could work, because with my work, I bought a house, I raised a family, I school my kids. With my work, I wouldn't need to come here because I was making good money." Tr. at 39. He also stated, "If I would feel good, I would go to work, because I was making good money." Tr. at 39. Claimant further testified that he has problems with "[t]he neck,

the back and the leg. When I move a little, I have a lot of pain. I can't sleep at night, I get up, I walk around the house. I can't stay like this, see, now I'm tired, I need to walk a little. I can't sit for a long time, neither can I stand for a long time…When I walk a half a block to a block, a little fast, forget about it, I don't feel the leg no more." Tr. at 40. As to his credibility, Claimant testified, "I can't lie, because I don't know how to say a lie." Tr. at 41.

While working at Howland Hook as a holdman, Claimant had to stand "two hours, three hours, four hours, it depends how the work goes." Tr. at 42. Also he couldn't "sit down because any minute some other job works. You're always moving around." Tr. at 42. When I asked Claimant if he now had any physical problem that would not allow him to drive a hustler, he responded, "Now I can't even sit or stand. How can I drive? I couldn't do anything. I wish I could work. I would go with pleasure. I like work." Tr. at 43.

Claimant was asked by his counsel to explain why he stated at his deposition that he did not remember injuring his back prior to the accident of 2003. Claimant answered, "I remember at that moment when they asked me, I didn't remember. That's because I couldn't hear and I was confused because they asked me a lot of questions. But then the lawyer showed me some papers and I remembered it. I can't say a lie." Tr. at 47.

On cross-examination, Employer's counsel probed into matters concerning Claimant's 1999 accident and injury at Howland Hook. Claimant was injured in 1999 and was out of work for nine months after that injury. Tr. at 50. Claimant seemed unwilling to answer counsel's question concerning whether he filed a Workers' Compensation claim after the accident. Tr. at 50-51. Twice Claimant stated, "When I felt good, I went back to work." Tr. at 50, 51. Claimant hired Mr. Rooney, his current attorney, immediately after his 1999 injury. Tr. at 51. Claimant also stated that he saw Drs. Patel and Parisi after his 1999 injury, although he failed to disclose that information at his deposition. Tr. at 53.

Much of Claimant's testimony during cross-examination, re-direct examination, and recross-examination was devoted to an attempt to discover whether Claimant was required to take other assignments if there was no work for him in the hold or whether he did so voluntarily. Claimant's testimony on that issue was thoroughly unresponsive but I have discerned from the record that before he was injured, Claimant chose to work as much as he possibly could to maximize his pay. Tr. at 70. Claimant concluded his testimony by testifying that he doesn't do much during the day but is able to drive and does drive his wife to work. Tr. at 76.

2. Testimony of John D. Atkins (Tr. at 78-109)

John D. Atkins was called as a witness by and on behalf of the Employer. Mr. Atkins is employed by Howland Hook as Vice President of Operations. Tr. at 78-79. He oversees the day to day operations of the terminal, including labor management. Tr. at 79. He has approximately twenty years of experience in terminal operations. Tr. at 80.

Mr. Atkins explained that when Claimant testified about working in a gang, he was talking about working as a holdman. Tr. at 80. The lifting involved in the holdman position is minimal, and involves lifting automatic twist-lock shoes that weigh about fourteen pounds. Tr. at

81. Other than handling those shoes, a holdman does not have to do any lifting. Tr. at 81. A holdman also does a minimal amount of bending. Tr. at 82. Although Claimant testified that his job involved climbing ladders, Mr. Atkins testified that a holdman is not required to climb ladders. Tr. at 82. A holdman reaches the top of containers by being lifted onto them in a safety cage. Tr. at 82.

A holdman stands when he is installing the automatic shoes. However, only 40% of the containers require shoes and so when the holdman is working on one of the 60% of containers that do not require shoes, the only thing the holdman does is give hand signals to the tractor driver and the common practice is to do this while sitting in a chair. Tr. at 84.

Mr. Atkins testified that if Claimant wanted to only work as a forklift driver when he did warehouse work, Howland Hook would allow him to do so. Tr. at 86. That position includes no heavy lifting or frequent bending. Tr. at 86. The position of hustler driver also does not involve heavy lifting. Tr. at 88.

Mr. Atkins also testified that because of Claimant's seniority status, he would never be required to work any position other than a holdman. His seniority allows him to remove himself from the Employer's hiring system without penalty if his gang has no work for the day. Tr. at 102-103.

Medical/Expert Evidence

1. Dr. Sudha Patel (CX.-11)

Dr. Sudha Patel testified by deposition on July 12, 2005. Dr. Patel is a licensed physician in the State of New York who practices out of Brooklyn. Dr. Patel graduated from Baroda Medical College in India in 1969 and received a Master of Surgery ("MS") degree in 1973. She then emigrated to the United States and underwent four years of training in general surgery in trauma from 1973 to 1977 in New York City. Dr. Patel has practiced with her associate, Dr. Antonio Parisi, since 1977. CX.-11 at 3-4. Dr. Patel was board certified by the American Board of Surgery in 1981 until 1992 but hasn't had the time to become recertified since then. CX.-11 at 4. She specializes in "general surgery and trauma, injuries…meaning surgeries of abdomen, hernia, breast, arms, legs. Not the bones. Apart from the bones." CX.-11 at 5. Dr. Patel does not do back or neck surgeries and does not consider herself a qualified orthopedic surgeon. CX.-11 at 5. Rather, Dr. Patel conducts the initial treatment of patients and then, if a patient does not recover to her expectation, refers them to specialists. CX.-11 at 7.

Dr. Patel first treated Claimant after the injury at issue on March 31, 2003. The doctor was acquainted with Claimant, having treated him for a back injury that Claimant sustained on January 12, 1999. CX.-11 at 10. Upon examination of Claimant on March 31, 2003, Dr. Patel concluded that he was totally disabled and that the injury of March 29, 2003 was the cause of Claimant's disability. CX.-11 at 12. Dr. Patel ordered X-rays and instituted a course of treatment that included physical therapy. CX.-11 at 13. Claimant's health seemed to progress positively under the treatment Dr. Patel prescribed except "his low back expressed this spasm and tenderness and restricted motion [that did] not resolv[e] satisfactorily." CX.-11 at 14. Dr. Patel

then requested and arranged for an MRI to be taken of Claimant's cervical spine on July 9, 2003. CX.-11 at 15. The MRI revealed "mild disk bulge multilevel at C3-C4, C4-C5, C5-C6." CX.-11 at 15. An MRI of Claimant's lumbosacral spine taken in July of 2003 revealed a "small left paracentral disk herniation seen at L4-L5." CX.-11 at 15.

Dr. Patel was not optimistic about Claimant's prognosis and pronounced it "guarded for recovery. He will not recover fully. He'll stay as is or as the time goes, he can get worse because as we get older, the arthritis degenerative condition gets worse." CX.-11 at 26. Dr. Patel opined that Claimant's condition is permanent. CX.-11 at 26.

Dr. Patel was asked for her opinion regarding certain positions that vocational expert Joseph Lopez had identified as suitable employment alternatives for the Claimant. The physician opined that she did not believe that Claimant could work as a concierge for forty hours a week because "he can't be seated eight hours a day". CX-11 at 17. In addition, the doctor expressed concern about a job's location: "to get to where the job is located for him, public transportation is not easy." CX.-11 at 27. The doctor did concede, however, that Claimant could perform that job "a few hours a day." CX.-11 at 27.

Dr. Patel opined that Claimant couldn't use public transportation during rush hours but could drive a car if he could stop and get out after half an hour. CX.-11 at 28. With respect to taking public transportation in non-rush hour conditions, the doctor concluded that Claimant could travel a five to eight mile radius, depending on "how fast the transportation is taking" but could not use transportation that utilizes steps or stairs like the subway. CX.-11 at 29. Dr. Patel also opined that Claimant would have to be offered a flexible schedule because there would be some days when his pain would be too great for him to get out of bed. CX.-11 at 29-30. Dr. Patel doubted that Claimant could perform the position of security guard proposed by Mr. Lopez, because "he cannot protect." CX.-11 at 32.

On cross-examination, Dr. Patel acknowledged that the reports of Victory Memorial Hospital (EX.-1) reflected that Claimant suffered pain in the right leg but did not note pain in the left leg. CX.-11 at 46. Dr. Patel also acknowledged that her note dated April 9, 2003, reveals that Claimant suffered pain in the right leg but not in the left leg. CX.-11 at 47. Dr. Patel then addressed a report that she submitted to the DOL dated May 5, 2003 (EX.-2), in which she observed that Claimant suffered from right lumbar radiculopathy with no mention of left lumbar radiculopathy. CX.-11 at 48. A second report by the doctor dated June 30, 2003 (EX.-2), also indicates that Claimant suffered from right lumbar radiculopathy but does not mention left lumbar radiculopathy. CX.-11 at 29. Dr. Patel's records disclosed that as of February 11, 2004, Claimant reported pain radiating down his left leg. CX.-11 at 50. In a report to the DOL dated June 4, 2004, Dr. Patel advised that Claimant now suffered from pain radiating down the left leg and did not discuss right leg pain. CX.-11 at 50.

On the report to the DOL dated June 4, 2004, Dr. Patel concluded that Claimant has a "permanent partial disability of lumbosacral spine and the left leg." CX.-11 at 53; EX.-2 at 27. In that report she did not refer to Claimant's right leg because, as she testified, the "right leg had radiculopathy but was restricted to the point that I did not feel that the right leg had as much permanent." CX.-11 at 54. With respect to the time period within which symptoms typically

develop, Dr. Patel stated that "radiculopathy sometimes can take a very long period, even three months, four months." CX.-11 at 76. Dr. Patel denied that it was unusual to experience radiating pain that was not constant, and explained "[s]ometimes patient feels more on one side and he's going to express that day that side. Then other time he feels more on the other side, he's going to complain other side. That's why – radicular pain is not seen". CX.-11 at 78-79.

In Dr. Patel's opinion, Claimant does not have a neck injury that would prevent him from working. CX.-11 at 67. However, the doctor opined that Claimant could not perform the job duties necessary of a longshoreman because of his back and leg. CX.-11 at 77. Dr. Patel's most current report of record, dated June 4, 2004, states the following opinion:

> Patient has permanent partial disability of L/S spine and left leg and he will not be able to return to work as a longshoreman or ever again fully employed.

CX.-3; EX.-2 at 28.

2. Kenneth Seslowe, M.D. (CX.-7; EX.-8; EX.-14)

a) Reports of Dr. Seslowe (CX.-7; EX.-8)

The record reflects that Dr. Kenneth Seslowe, M.D., filed three reports to the DOL concerning Claimant.

1. Report of March 29, 2004

At the request of the DOL, Dr. Seslowe first examined Claimant on March 29, 2004. At that time, Claimant complained of "low back pain radiating down more on the left side." EX.-8 at 61. Claimant denied any prior injuries to his back. EX.-8 at 61. Dr. Seslowe reviewed some of Claimant's medical records, including the MRI of July 10, 2003, and stated, "[t]here is record of prior back injuries, but [Claimant] denies these." EX.-8 at 62. Dr. Seslowe's impression was that Claimant suffered from a "lumbosacral sprain with evidence of a left-sided sciatica." EX.-8 at 62. Dr. Seslowe recommended a trial of epidural injections if Claimant would agree to them. Further, he concluded that Claimant "does have a mild partial disability, which I feel is causally related to the March, 29, 2003 accident." EX.-8 at 62.

2. Report of April 23, 2004

Dr. Seslowe's report of April 23, 2004 supplements his first report. Dr. Seslowe simply stated that Claimant refused epidural injections and that Dr. Seslowe would consider surgery for removal of the disc. If Claimant refused surgery, Dr. Seslowe concluded that he would not feel any further treatment "is indicated." EX.-8 at 63.

3. Report of June 28, 2004

Dr. Seslowe's third report to the DOL concluded that Claimant "could return to light work. He cannot do heavy lifting of more than 40 lbs. or frequent bending. He could do lighter

type work." EX.-8 at 64.

b) Deposition of Dr. Seslowe (EX.-14)

Dr. Seslowe testified by deposition on July 26, 2005.[10] Dr. Seslowe attended the Albert Einstein College of Medicine and graduated in 1964. He was licensed to practice medicine in the State of New York in 1965, is Board certified in orthopedic surgery, is a Fellow in the American Academy of Orthopedic Surgeons, is a Fellow in the International College of Surgeons, and is a Fellow in the American College of Surgeons. Dr. Seslowe is also an assistant clinical professor of orthopedics at New York University, and is in attendance at New York University and at the Hospital for Joint Diseases in New York. EX.-14 at 4.

Dr. Seslowe has been conducting impartial medical examinations for the DOL for a number of years. EX.-14 at 5. He stated that his duties as an impartial medical examiner require him to undertake the following tasks:

> To take a history of a, usually an industrial accident, to evaluate the patient, to then decide whether further treatment is necessary, and if the patient is disabled and if a patient is disabled, what limitations they have to return to some type of gainful employment or full employment.

EX.-14 at 5. Dr. Seslowe does not interact with anyone representing the Carrier or the Employer in connection with the examination. EX.-14 at 5.

Dr. Seslowe examined Claimant on March 29, 2004. Dr. Seslowe testified that Claimant denied having a prior back injury (prior to the March 2003 accident) despite the fact that there existed medical records to the contrary. EX.-14 at 7. The doctor opined that the extent of Claimant's disability was "a mild partial disability" (EX.-14 at 9) which restricted Claimant from "do[ing] any heavy lifting of more than 40 pounds or frequent bending, lifting type work. I feel he could be on his feet for a full eight hours." EX.-14 at 11. Dr. Seslowe then stated that Claimant would be able to perform work that would not require lifting more than forty pounds or frequent bending. EX.-14 at 11.

The following is an excerpt from an addendum dated September 16, 2005 that was attached to Dr. Seslowe's deposition:

> There was an MRI done 07/30/99 indicating disc desiccation and mild annular bulge at L4-5 with some flattening of the thecal sac. It is noted that the recent MRI of 07/10/03 indicated a herniation at the L4-5 level, the same level that indicated a bulge following his initial injury. There is a distinct possibility that the injury to his back in 1999 caused the weakness in the area of the L4-5v disc, which progressed to a frank herniation. I, therefore, feel that his disability is materially and substantially greater due to the 1999 accident than it would have been from the 03/29/03 accident alone.

[10] Counsel for the Claimant made no appearance at the deposition of Dr. Seslowe.

EX.-14 at Addendum.

3. Lawrence E. Miller, M.D. (EX.-6; EX.-16)

a) Reports of Dr. Miller (EX.-6)

The record reflects that Dr. Lawrence E. Miller, M.D., filed four reports concerning Claimant.

1. Report of May 8, 2003

Claimant was seen for an independent orthopedic evaluation in Dr. Miller's office on May 8, 2003. A medical assistant and Claimant's wife were in the room during the entire evaluation. EX.-6 at 38. Claimant reported as part of his medical history that "he had a prior motor vehicle accident ten years ago from which he has recovered. He additionally stated that he had a prior work-related incident in which he injured his back." EX.-6 at 39. Claimant also disclosed that he experienced pain in the right and left foot and that "the pain radiates down his right leg." EX.-6 at 39.

Dr. Miller's diagnosis was that Claimant had "resolved bilateral foot, cervical and lumbo-sacral strain/sprain." EX.-6 at 40. Dr. Miller stated "[i]f the history is correct, then there appears to be a cause and effect relationship between Claimant's original complaints and the reported incident of March 29, 2003." EX.-6 at 40. Dr. Miller opined that Claimant's "subjective complaints are not supported by the objective findings." EX.-6 at 41. Further, Dr. Miller found no orthopedic disability and concluded that Claimant was "capable of pursuing gainful employment on a full-time basis and resuming his normal activities of daily living, with no orthopedic restrictions or limitations." EX.-6 at 41. In Dr. Miller's opinion, Claimant had reached maximum medical improvement with respect to the accident of March 29, 2003. EX.-6 at 41.

2. Report of February 26, 2004

Dr. Miller re-examined Claimant on February 26, 2004, at which time Claimant denied having any other accidents or injuries of this type. EX.-6 at 43. Claimant's complaints at the time of the re-examination included pain radiating "down both of his arms and legs." EX.-6 at 44.

Dr. Miller's diagnosis was "resolved bilateral foot, cervical and lumbo-sacral strain and sprain. Bilateral knee complaints." EX.-6 at 46. It was Dr. Miller's opinion that the accident sustained on March 29, 2003, caused "a temporary exacerbation to the underlying pre-existing osteoarthritic changes and degenerative changes, as noted on the x-ray reports." EX.-6 at 46. He further opined that "since the Claimant's initial complaints were resolved on the last examination, dated May 8, 2003, it is this examiner's opinion that the current complaints of pain in the right and left knee, right and left foot, cervical and lumbo-sacral spine are not directly related to the accident of record." EX.-6 at 46. Further, Dr. Miller stated that Claimant "has engaged in attempting to magnify or over-represent the extent of [his] pain." EX.-6 at 46.

Dr. Miller concluded this report by again finding that Claimant had reached his maximum medical improvement with respect to the accident of March 29, 2003, and that there was no orthopedic disability demonstrated. EX.-6 at 47. It was his opinion that Claimant was capable of working on a full-time basis.

3. Report of March 24, 2005

Claimant was again re-evaluated in Dr. Miller's office on March 24, 2005. Claimant complained at that time that he was "still experiencing intermittent pain in the cervical and lumbo-sacral spine, with pain radiating down his left leg. He also states that he experiences headaches." EX.-6 at 50. Following this re-evaluation Dr. Miller diagnosed Claimant with resolved cervical and lumbo-sacral strain/sprain and resolved bilateral foot strain/sprain. EX.-6 at 51. Dr. Miller stated, "[i]t does appear that the Claimant has engaged in attempting to magnify or over-present the extent of his pain, as the alleged complaint of pain on doing these [Miller and Edwards] tests cannot be explained on the basis of known physiological mechanisms. In addition, even though the Claimant stated the pain radiates down his left leg, there is no clinical evidence of disc herniation or radicular component referent to the cervical or lumbo-sacral spine at the time." EX.-6 at 51. Again, Dr. Miller opined that Claimant was capable of returning to work and had reached maximum medical improvement. EX.-6 at 52.

4. Report of April 15, 2005

In Dr. Miller's report of April 15, 2005, he notes that by request of the Carrier, he reviewed the MRI report of Claimant's lumbo-sacral spine dated July 10, 2003, which shows a small left paracentral disk herniation at L4-5. Dr. Miller stated, "Even though this MRI was reported as positive for a small paracentral disk herniation at L4-5, there was no clinical evidence of disk herniation or radiculopathy at that time or March 24, 2005…It is a well-known medical fact that there can be false positive and/or negative results and a true evaluation of a patient must involve clinical correlation of the test results with a physical examination. In this case, the clinical findings do not correlate with the radiographic findings." EX.-6 at 54. Dr. Miller continued that "[Claimant's] attempt to misrepresent the extent of his pain on both [of Dr. Miller's evaluations] clearly demonstrates his lack of credibility in terms of pain he is having." EX.-6 at 55. Dr. Miller therefore found no basis to change his earlier opinions found in his earlier reports.

(b) Dr. Miller's Deposition

Dr. Miller testified by deposition on August 9, 2005, at his office in the Bronx, New York. Dr. Miller received his undergraduate degree from the University of Tulsa and then graduated from the Philadelphia College of Osteopathic Medicine in Philadelphia in 1957. He completed a one-year internship at Metropolitan Hospital. He then completed a one-year general residency and a residency in the field of orthopedic surgery, the last year being chief resident of the hospital. Dr. Miller then practiced as an orthopedist at Memorial Hospital in New Jersey as chief of the emergency room. Later in life, Dr. Miller underwent a residency in the field of psychiatry at the New Jersey Medical School in the VA Hospital. He is Board Certified in the

fields of orthopedics and psychiatry in the States of New York, New Jersey, and Pennsylvania. EX.-16 at 4. Currently, Dr. Miller performs independent medical examinations (IME) and has a private practice in orthopedics and psychiatry but does not perform surgeries. EX.-16 at 5.

Dr. Miller reviewed the following medical records for his evaluation: report by Drs. Parisi and Patel dated March 31, 2003; X-ray reports of the cervical spine dated April 1, 2003; X-ray report of the right lower leg dated April 1, 2003; and a Workers' Compensation form. EX.-16 at 7. Dr. Miller testified that when he saw Claimant on May 8, 2003, he complained of "pain in the right and left foot, cervical and lumbosacral area, and he also stated the pain radiates down his right leg." EX.-16 at 7. When asked if Claimant complained of pain radiating down his left leg, Dr. Miller answered, "Not at all at that time." EX.-16 at 7.

During his clinical examination of Claimant, Dr. Miller conducted a right and left "Miller Test", which Claimant reported caused pain down to his right and left ankles. EX.-16 at 10. Dr. Miller explained that such findings demonstrated symptom magnification:

> It means the patient's lying, because again it's impossible – it's like pressing your finger on your nose and having your knee turn purple. Where I press, with the Miller Test, it's impossible – there's no nerve endings going down the leg. I know the individual is lying to me.

EX.-16 at 10. This helped lead Dr. Miller to conclude that "there was absolutely no orthopedic disability at all." EX.-16 at 11. Dr. Miller also concluded that Claimant had no work restrictions. EX.-16 at 11.

Dr. Miller examined Claimant a second time on February 26, 2004. At that examination, Dr. Miller reviewed the MRI report of Claimant's lumbar spine which the doctor said revealed a "small left paracentral disc herniation at L4-5." EX.-16 at 12. Dr. Miller had not found any clinical evidence of a disc herniation on his initial examination of Claimant. EX.-16 at 12. Dr. Miller conducted a second Miller Test at the February examination and once again Claimant reported pain. EX.-16 at 14. Dr. Miller also conducted an Edward's Test during the February examination. An Edward's Test is "basically the same thing [as a Miller Test] except you are pressing behind the ear. There are no nerve endings behind the ear to give you pain into the shoulder or down the fingers." EX.-16 at 15. Claimant reported pain down his left shoulder from the Edward's Test, which Dr. Miller testified was impossible. EX.-16 at 14-15. After the February examination, Dr. Miller once again concluded that "there was no orthopedic disability at all. [Claimant] was capable of working on a full-time basis." EX.-16 at 15. Dr. Miller found that Claimant was exaggerating his symptoms. EX.-16 at 16.

Dr. Miller testified that if Claimant had a herniated disc, he would expect Claimant to have "[p]ain down his leg, lifting his leg, there would be pain, tension test would be painful, everything would be positive, there would be muscle spasm. You can't fake muscle spasm, you can't." EX.-16 at 17. He continued to say that a herniated disc would produce muscle spasm, and Claimant had no spasms. EX.-16 at 17. Dr. Miller also noted that Claimant complained of pain down both legs on the second examination as opposed to only having pain in his right leg during the first examination. EX.-16 at 17-18.

Dr. Miller evaluated Claimant a third time on March 24, 2005, and on that occasion, Claimant complained of headaches and pain down his left leg. EX.-16 at 18-19. He did not complain of pain in his right leg. EX.-16 at 19. When asked if Claimant had given him inconsistent pain complaints during his three evaluations, Dr. Miller answered:

> Definitely. If you have a herniated disc, it's pressing on the nerve root on that particular side, right or left, and it doesn't switch over. It does not come back into the nucleus and then go out the other side. It's steady on that particular side, and it doesn't switch around. Patients don't know that, and sometimes they do just as you said, switch from one side to the other.

EX.-16 at 20. After this third evaluation, Dr. Miller again found that Claimant had no disability and "was in excellent shape." EX.-16 at 22.

On cross-examination Dr. Miller stated that the Miller Test he conducted on Claimant was developed by him and named after his son. EX.-16 at 27. When asked where one would look to verify that the Miller Test was recognized among orthopedists, Dr. Miller responded, "You wouldn't find it anyplace because I don't want to write it up yet. When I retire I will write it up." EX.-16 at 28. Dr. Miller also developed the Edward's Test, titled so after his middle name. EX.-16 at 28. The Edward's Test, like the Miller Test, is not published or used within the medical community. EX.-16 at 29. Both of those tests led to Dr. Miller's opinion of Claimant that "he's one of the biggest liars I've had. He's nothing but a malingerer and he's looking for money." EX.-16 at 36. Dr. Miller also stated that he developed these tests "because there are phonies out there" but he is not looking for them, he just wants to put down true statements of what he finds. EX.-16 at 37. On re-direct examination, Dr. Miller stated that the Miller and Edwards Tests are "the same test[s] done by thousands of orthopedists." EX.-16 at 58. He has simply developed names for those procedures that other physicians wouldn't recognize. EX.-16 at 59.

Dr. Miller testified that a central herniated disc would cause pain radiating into both legs. EX.-16 at 39. Claimant's MRI report stated that Claimant's herniation was "left paracentral" and the doctor acknowledged that paracentral means "in the central area, around the center." EX.-16 at 39.

4. Melvin P. Vigman, M.D. (EX.-7; EX.-15)

a) Dr. Vigman's Reports (EX.-7)

Dr. Melvin P. Vigman, M.D., filed two reports with the DOL. The first report was dated September 22, 2003. EX.-7 at 56-58. Dr. Vigman evaluated Claimant, who was accompanied by a translator, on September 18, 2003. Claimant claimed to have "pain in the back radiating into both legs right greater than left, and a feeling of legs shaking when he walks. He also has neck and trapezius area pains." EX.-7 at 56. Claimant denied any past or subsequent injuries or accidents. "Later in the interview, the translator stated that maybe he did have previous injuries or accidents, but he cannot recall anything about them." EX.-7 at 56.

Dr. Vigman's impression after the first evaluation was that there was no neurological disease. EX.-7 at 58. He also commented, "[Claimant] obviously had minor injuries that he has magnified, distorted and embellished…The Emergency Room note is very clear on the minor nature of the injuries and multiple examinations show the same. The finding on the lumbar MRI of minimal disc change is consistent with degenerative changes noted in a person age 63, and have [sic] nothing to do with this minor trauma, and certainly are [sic] not causing any neurological problem at all. The disc change should be considered clinically insignificant…in my opinion, he is exhibiting behavior that is consistent with malingering…He is certainly capable of returning to work". EX.-7 at 58.

Dr. Vigman's second report was filed with the DOL on March 31, 2005 after the doctor had evaluated Claimant for the second time on March 23, 2005. Claimant denied past or subsequent injuries or accidents. EX.-7 at 59. Dr. Vigman's impression once again was that Claimant suffered from no neurological disease. EX.-7 at 60. He further commented, "[Claimant] continues to show some degree of exaggeration and embellishment…He has a full neurological ability to return to any type of work…In summary, he has 0% disability neurologically. EX.-7 at 60.

b) Dr. Vigman's Deposition (EX.-15)

Dr. Melvin P Vigman, M.D., testified by deposition on July 25, 2005. The doctor graduated from Hahnemann Medical College of Philadelphia in 1964, and then completed a general internship at Lerman Hospital in San Francisco. Dr. Vigman then served as a general medical officer in the army; and then completed a one year internal medicine residency at Hahnemann Hospital followed by three years in a neurology residency at University of Pennsylvania. EX.-15 at 3-4. His current practice, based in Summit, New Jersey, consists of general neurology, mostly for adult patients. EX.-15 at 4. He is a board certified neurologist, has a hospital affiliation with Overlook Hospital, and is on the teaching faculty as a clinical professor of neurology at Robert Wood Johnson Medical College. EX.-15 at 4.

Dr. Vigman performs independent medical evaluations ("IME") from time to time. IMEs are evaluations conducted in connection with some type of litigation such as Workers' Compensation claims or personal injury claims. EX.-15 at 4-5. Dr. Vigman was asked to perform an IME in this case by the Carrier.

Dr. Vigman first examined Claimant on September 18, 2003 and filed a report dated September 22, 2003. Claimant gave Dr. Vigman a medical history through a translator. EX.-15 at 5. Claimant stated that he was involved in an accident in which he fell at work. Claimant advised that he went to the hospital the day after the accident for back pain, saw an orthopedist, underwent an MRI, and received physical therapy treatments. EX.-15 at 5-6. Dr. Vigman stated that when he saw Claimant in 2003, Claimant had "pain in the back radiating into both legs, right and left, and feeling of leg shaking when he walked. He was also complaining of neck and trapezius area pains…He also denied any past or subsequent injuries or accidents. When I asked him that later in the interview, the translator interjected that he may have had previous injuries or accidents, but he was unsure about that and was unable to recall any specifics if he did have

any." EX.-15 at 6.

Dr. Vigman's diagnosis was that Claimant had "no neurological damage, disease or anything else neurological." EX.-15 at 10. Dr. Vigman stated in his report that Claimant had minor injuries that he had magnified, distorted and embellished. EX.-15 at 10. When asked why he came to that conclusion, Dr Vigman answered:

> I reached it based on the records primarily. The records from the emergency room, Dr. Magliato and Dr. Miller as well as the minimal change on the MRI scans indicated clearly that the injuries which are bruising and soft tissue strains, and that there was never any injury that would be long lasting. These were all types of temporary injuries, so that my feeling the continued symptoms and the fact that he was using a cane which has no purpose whatsoever in back pain problems, no medical purpose, no other purpose in back pain problems, it is not a – it does not help back pain in anyway. So he was using a cane, no doctor had told him to use the cane, there was no reason to use it. Neurological exam was normal, the fact that he just did not go back to work at all suggested to me that he was significantly magnifying and distorting his situation.

EX.-15 at 11.

Dr. Vigman was then asked if the MRI of July 2003 showed any evidence of a lumbar radiculopathy and he answered that no, the MRI did not show that. EX.-15 at 12. Dr. Vigman also concluded that from a neurological standpoint, Claimant was capable of returning to work after the September 18, 2003 examination. EX.-15 at 13-14. He also concluded that Claimant needed no further neurological treatment or testing. EX.-15 at 14.

At the request of the Carrier, Dr. Vigman examined Claimant a second time on March 23, 2005. EX.-15 at 14. This examination was also performed with the aid of a translator. EX.-15 at 15. Once again Claimant denied any past injuries or accidents. EX.-15 at 15. Dr. Vigman's diagnosis at the conclusion of the second exam was, as before, that there was no neurological disease present. EX.-15 at 16. Also, Dr. Vigman opined once again that Claimant was fully able, from a neurological standpoint, to return to any type of work. EX.-15 at 17. Dr. Vigman also stated that Claimant's small left-sided paracentral disc herniation at L4-5[11] would not be considered an abnormal finding considering Claimant's age because discs degenerate with age. EX.-15 at 17-18.

On cross-examination, Dr. Vigman distinguished between a "bulging disc" and a "herniated disc:" a "bulge is loosening of the outer annulus fibrosis, so the disc shape changes, but the annulus fibrosis is not torn. Herniated disc, it needs a torn annulus fibrosis for the central nucleus pulposus to push through." EX.-15 at 24. Also on cross-examination, Dr. Vigman stated that as a neurologist, he was unable to give an opinion one way or another concerning the fact that two orthopedics found Claimant to be disabled from an orthopedic perspective. EX.-15 at 40.

[11] As found on the July 2003 lumbar MRI.

5. Report of Andrew Merola, M.D. (CX.-2; EX.-5)

Each party submitted the report of Andrew A. Merola, M.D., dated November 10, 2003. Dr. Merola's diagnosis was left lower extremity radiculopathy and that the disability was partial. Dr. Merola recommended three months of physical therapy and possible epidural steroid injections should physical therapy fail to improve Claimant's condition. CX.-2 at 2.

6. Reports of Henry J. Magliato, M.D. (CX.-4; EX.-3)

Each party submitted two reports by Henry J. Magliato, M.D., dated June 19, 2003, and August 31, 2003.

On June 19, 2003, Dr. Magliato performed an impartial orthopedic consultation with Claimant pursuant to the request of the DOL's Assistant Deputy Commissioner. CX.-4 at 1. It was his opinion that Claimant sustained cervical and lumbar sprains and contusions causally related to his accident. CX.-4 at 3. Dr. Magliato also opined that Claimant "still appears to be disabled for the work required for a longshoreman." CX.-4 at 3. It should also be noted that under the subsection of Dr. Magliato's report titled "Past History," Dr. Magliato noted, "[Claimant] indicates that he may have lost about 3-4 months from work from the 1999 accident." CX.-4 at 2.

On August 21, 2003, Dr. Magliato reviewed his prior report of June 19, 2003, and the results of an MRI study that was conducted on July 9, 2003 by Dr. Shankman, a radiologist. CX.-4 at 4. After review of this medical evidence, Dr. Magliato opined that "it appears that the cervical syndrome was basically a sprain and should have been completely resolved by this time. However, the lumbar injury still seems to be symptomatic as of the date of my examination of 6/19/03 and we now have some MRI evidence of a small paracentral disc herniation of L4-L5." CX.-4 at 5.

7. Report of Ashok Anant, M.D. (CX-10)

Dr. Anant filed a report in the form of a letter to Dr. Antonio Parisi dated June 22, 2004. Dr. Anant examined Claimant in his office in Brooklyn, New York on that date. Dr. Anant reported that his review of the MRI performed on July 10, 2003 indicates "a small disc herniation and discogenic disease at L4-5. Disc degeneration is noted at L5-S1. There is no evidence of significant spinal stenosis or extruded disc fragments." CX.-10 at 2. Dr. Anant also opined that "the source of [Claimant's] pain, at present, is unclear, other than the fact he might have had significant muscular strain at the time of the accident." Id.

8. Deposition of Joseph Lopez (EX.-17)

Joseph Lopez is employed as a vocational rehabilitation counselor by Crawford Health Care Management Services in Melville, New York, which provides vocational and medical rehabilitation services to injured workers involved in Workmen's Compensation cases. EX.-17 at 3-4. Mr. Lopez has a Masters of Arts and Masters of Education from Columbia University. EX.-17 at 4. He is a certified rehabilitation counselor and is also certified by the Office of Workers'

Compensation Programs ("OWCP") of the DOL. EX.-17 at 5. He was deposed on June 16, 2005, and his resume (i.e., CV) is attached to his deposition as Lopez Exhibit 1.

A vocational rehabilitation counselor assists injured workers in identifying positions of employment for which they have transferable skills and would be physically capable of performing. EX.-17 at 5-6. They also perform, from time to time, transferable skills analysis and labor market surveys on behalf of Workers' Compensation Carriers. Transferable skills analysis consists of determining the transferable skills that the particular person may possess based on the individual's prior work history. EX.-17 at 6. In the instant matter, Mr. Lopez performed a transferable skills analysis and labor market survey with respect to Claimant. EX.-17 at 7. Mr. Lopez met with Claimant at his attorney's office and conducted a vocational assessment interview. EX.-17 at 7. No interpreter was requested for that interview but Mr. Lopez testified that Claimant understood his questions and he understood Claimant's responses. EX.-17 at 8.

Mr. Lopez found that Claimant had a fifth grade level of education. EX.-17 at 8. Mr. Lopez then concluded that, physical limitations aside, Claimant was capable of performing unskilled, entry level employment in positions that require no prior experience, training, or education. EX.-17 at 9.

When preparing his labor market survey, Mr. Lopez relied upon the physical limitations imposed on Claimant by Dr. Seslowe. EX.-17 at 10. Dr. Seslowe indicated that Claimant could lift up to forty pounds and perform light-duty work. EX.-17 at 10. Relying upon Claimant's vocational profile and the physical limitations imposed by Dr. Seslowe, Mr. Lopez identified two positions within Winfield Security that fit Claimant's profile: concierge and mobile security guard. EX.-17 at 11. The concierge position entails:

> You are seated at a desk in a residential building and you greet people as they enter the building and you may ask them to sign a book and you act as a person who would call and announce the person as a visitor making sure there's no one entering the building who shouldn't be entering the building…is allowed to ultimately sit and stand at will, walk around their area, make sure the area is clear…this would be a sedentary position…[in which] there would be alternate sitting and standing and no lifting above ten pounds.[12]

EX.-17 at 12-13. Winfield Security has specific available positions of concierge located throughout the five boroughs of New York, including Brooklyn. EX.-17 at 13-14. The pay rate for concierge is ten dollars per hour. EX.-17 at 14.

The security guard position at Winfield Security entails:

> Patrol an assigned area in a motor vehicle, walking also to patrol the area, perform short patrols around the area and being generally stationed within the car outside of a site, at a particular site or post that you are assigned to patrol…it would be classified as sedentary to light which although there is no lifting above ten pounds

[12] Mr. Lopez learned of this information by personally meeting with Mr. Roy Thorpe of Winfield Security. EX.-17 at 11-12.

because you're utilizing a motor vehicle, it would fall into sedentary to light duty position.

EX.-17 at 15. The security guard positions are located throughout the five boroughs of New York City, including Brooklyn, and the pay rate is ten dollars per hour. EX.-17 at 15-16. Further, full and part-time work is available for the security guard position. EX.-17 at 16. Mr. Lopez concluded the physical restrictions imposed by Dr. Seslowe and Claimant's vocational profile, Claimant is capable of work outside of Howland Hook. EX.-17 at 20.

Mr. Lopez opined that Claimant's assertions that he looked for work over the course of less than one week does not equate with a diligent job search. EX.-17 at 19. In Mr. Lopez's experience, a successful job search would generally involve "contact[ing] prospective employers on a daily basis, spend[ing] several hours a day contacting prospective employers on a daily basis for several months." EX.-17 at 19.

On cross-examination, Mr. Lopez disclosed that he was instructed to conduct his labor market survey utilizing only those restrictions set forth by Dr. Seslowe. EX.-17 at 23. Thus, he did not consult with Claimant's treating physician on these matters. EX.-17 at 23. Mr. Lopez also stated that the positions he found do not require the worker to physically restrain disorderly persons. EX.-17 at 26-27. Mr. Lopez could not identify for the record "a concrete position at a concrete location with a concrete number of hours and a concrete number of weekly earnings" for Claimant. EX.-17 at 37-38.

On redirect examination Mr. Lopez disclosed that Winfield Security is located in Manhattan, New York and the employer in Manhattan assigns individual workers to several locations within the five boroughs of New York City. EX.-17 at 38. Also, he maintained that Dr. Seslowe did not comment on any restrictions of Claimant with regard to walking. EX.-17 at 38. The concierge position generally requires walking about one to thirty- three percent of the job time and the security guard position generally requires up to one hour of walking. EX.-17 at 40, 41.

Other Evidence

The following other evidence was also submitted into the record by the parties:

- Emergency room records of Victory Memorial Hospital dated 3/29/03 (CX.-1; EX.-1).
- Reports of Dr. Sudha Patel dated 3/31/03 through 6/4/04 (CX.-3; EX.-2).
- MRI of neck from Pinnacle Diagnostic Radiology dated 7/9/03 (CX.-5; EX.-4).
- MRI of lumboscral spine from Modern Medical Imaging, dated 7/10/03 (CX.-6; EX.-4).
- Correspondence from Verga Mechanical Corporation, M&L Ceramic Tile and Marble, Verrazano Tile & Granite (CX.-8).
- LS-208 dated 8/24/04 (CX.-9; EX.-10).
- Letter of District Director Richard V. Robilotti dated 3/7/05 (EX.-11).
- Records pertaining to prior claim arising out of Claimant's alleged January 12, 1999 accident (EX.-12).
- Transcript of Claimant's February 16, 2005 deposition (EX.-13).

B. Legal Analysis and Discussion

The parties stipulated in this case that Claimant was injured in a work-related accident at Howland Hook on March 29, 2003. After the accident, Carrier paid Claimant total temporary benefits for the period from March 31, 2003, through June 30, 2004, at the maximum compensation rate in effect on the date of the accident, and also provided medical benefits in accordance with Section 7 of the LHWCA. Claimant now requests that I find that he is "permanently and totally disabled and that he is entitled to such medical treatment as the nature of his injury may require." CB. at 33.

The concept of disability under the LHWCA is based on two classifications, the nature or duration of the disability (temporary or permanent) and the degree of disability (total or partial). Palombo v. Director, OWCP, 937 F.2d 70, 76 (2nd Cir. 1991) (citing Director, OWCP v. Berkstresser, 921 F.2d 306, 312 (D.C.Cir. 1991); see also 33 U.S.C. § 908(a)-(e). The date of "maximum medical improvement" – the point when the injury has healed to the full extent possible – marks the end of the temporary period of disability; thereafter any remaining injury is considered permanent. Id. The degree of disability, however, is not determined solely by reference to medical information. Id. The LHWCA defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). In accordance with this statutory definition, courts have viewed disability principally in economic terms, Palombo, 921 F.2d at 76, because the statutory definition "demonstrates that the LHWCA is designed to compensate for lost wage-earning capacity." Korineck v. General Dynamics Corp., 835 F.2d 42, 24 (2nd Cir. 1987). The degree of disability is therefore determined not only on the basis of physical condition but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that claimant can do. Odom Construction Co. v. U.S. Department of Labor, 622 F.2d 110, 115 (5th Cir. 1980) cert. denied, 101 S.Ct. 1482; Jacksonville Shipyards, Inc. v. Dugger, 587 F.2d 197, 198 (5th Cir. 1979).

1. The Degree of Disability [Total or Partial] Analysis

The Second Circuit employs a three-step burden-shifting process when analyzing total disability claims under the LHWCA. American Stevedores, Inc. v. Salzano, 538 F.2d 933, 935-36 (2nd Cir. 1976). First, a claimant must establish a *prima facie* claim by demonstrating an inability to return to his usual employment because of a work-related injury. If the claimant does so, the burden shifts to the employer to establish that the claimant is capable of performing suitable alternative employment. If the employer is found to have met its burden, the claimant is then provided the opportunity to rebut the employer's showing by demonstrating that he diligently tried, without success, to find another job. See Palombo, 937 F.2d at 76. Consequently, it is possible under the LHWCA for an individual to be totally disabled "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 1006 (5th Cir. 1978).

a) Claimant's Prima Facie Claim for Total Disability Benefits

In order to establish a *prima facie* claim for total disability compensation benefits, a claimant has the initial burden of proving his inability to perform his usual work as a consequence of the work injury. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56 (1985). The claimant must satisfy this burden by a preponderance of the evidence. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In evaluating whether the claimant has met this burden, the ALJ must compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1998); Bell v. Volpe/Head Constr. Co., 11 BRBS 377 (1979). At this initial stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C&P Tel. Co., 16 BRBS 89 (1984).

In order to determine whether Claimant has established a *prima facie* claim of total disability, I must compare Claimant's medical restrictions with the specific requirements of his usual employment as mandated by Curit v. Bath Iron Works., supra. Therefore, the first step in my analysis is to determine what Claimant's physical restrictions are. This issue is contested by both parties. The evidence on this issue reflects a wide disparity in the opinions of physicians of record.

Upon examination of Claimant on March 31, 2003, Dr. Patel concluded that Claimant was totally disabled and that the injury of March 29, 2003, was a competent producing cause of Claimant's disability. CX.-11 at 12. Dr. Patel's prognosis was that Claimant will not fully recover from his injury and that his condition is permanent. CX.-11 at 26. Dr. Patel's opinion remained unchanged, as her most current report of June 4, 2004, reflects that she considered Claimant to have "a permanent partial disability of L/S spine and left leg and could not perform his work as a longshoreman." CX 3. Dr. Patel further concluded that Claimant could not sit for 8 hours a day, would only potentially be able to work part-time, and would not be able to spend more than ½ hour traveling by public transportation to a work site.

Dr. Miller's position, on the other hand, is that Claimant has no disability at all and is in "excellent shape." EX.-16 at 22. Dr. Miller concluded that Claimant was capable of returning to his work as a longshoreman. EX.-6 at 52.

Dr. Seslowe concluded that Claimant had "a mild partial disability" due to his work place accident. EX-8. In his report of June 28, 2004, Dr. Seslowe stated that Claimant could perform light work, but restricted him from lifting more than 40 pounds or from frequent bending. EX 8 at 64.

Dr. Vigman found that Claimant was not disabled from a neurological standpoint. EX 15

Dr. Merola concluded that Claimant was partially disabled in a report dated November 10, 2003, and recommended a course of epidural steroid injections, which Claimant decline to receive.

Dr. Magliato concluded on June 19, 2003, that Claimant was disabled from performing work of a longshoreman. CX 4.

Dr. Anant offered no opinion regarding whether Claimant was disabled.

Claimant argues in its brief that Dr. Miller's testimony lacks credibility and is worthy of little weight. CB. at 26. Claimant notes that Dr. Miller's basis for attacking Claimant's integrity (Dr. Miller branded Claimant with the distinction that he was "one of the biggest liars [he has] had." EX.-16 at 36) is grounded on two tests that Dr. Miller himself invented, the Miller Test and the Edward's Test. CB. at 27. As conceded by Dr. Miller, he invented these tests, named them after himself and his son, and neither are recognized in a medical source, or used widely within the medical community. EX.-16 at 27-29.

Claimant also argued that Dr. Miller's bias is demonstrated by his observations about Claimant's use of a cane. Dr. Miller noted on his first examination report, dated May 8, 2003, that Claimant entered the examination room utilizing a cane which was not worn on the bottom, which Dr. Miller found shows that Claimant was not using the cane. EX.-6 at 39; EX 6 at 8; 26-27. However, the record does not show when Claimant first started using the cane, and Dr. Miller's second examination report, dated February 26, 2004, notes that Claimant was using a cane that was "notably" worn on the bottom. EX.-6 at 45. When questioned on cross-examination about the appearance of Claimant's cane, Dr. Miller responded that Claimant "either borrowed somebody else's cane or he was utilizing it." EX.-16 at 26. He further insisted that Claimant "might utilize a cane to make a good case" because "if [Claimant] wear[s] it out and [Dr. Miller] thinks [Claimant is] utilizing the cane, [Dr. Miller] will think [Claimant] really h[as] a problem." EX.-16 at 27.

I find that Dr. Miller's testimony reflects disregard for the medical evidence, and as such, is of little probative value. Although Dr. Miller acknowledged that an MRI of Claimant's spine showed a herniation in the central area, and further agreed that a centrally located herniation would cause radiating pain in both legs (EX 16 at 39), Dr. Miller nevertheless opined that Claimant's "subjective complaints are not supported by the objective findings" (EX 6 at 41). Dr. Miller denied that Claimant had spasm, and said spasm could not be faked; however, he failed to address Dr. Patel's treatment records, which consistently note the presence of spasm. In addition, Dr. Miller's insistence on referring to Claimant as a "liar" and a "phony" casts suspicion on his professional judgment. The doctor's testimony reflects an adversarial reluctance to answer questions straightforwardly. When combined with the doctor's speculation on Claimant's motives in having a cane, I find it warranted to concur with Claimant when he argues, "[i]n terms of demeanor and his response to questions, Dr. Miller does not comport himself as a disinterested medical expert." CB. at 28. Accordingly, I credit Dr. Miller's testimony little weight in this matter.

In similar fashion, I find that Dr. Patel's opinions are of minimal value on this issue. The doctor saw Claimant several days after his accident, and ordered a course of physical therapy. The doctor's medical treatment notes are brief and conclusory in nature, but consistently reflect that she believes Claimant to be totally disabled. However, in a report of June 4, 2004, Dr. Patel remarked "Patient has permanent partial disability of L/S spine and left leg and he will not be

able to return to work as a longshoreman or ever again fully employed." CX 3. In addition to being internally inconsistent, this opinion fails to describe how Claimant is limited from performing his regular duties. Nothing in Dr. Patel's treatment notes, reports, or testimony demonstrates her knowledge of the physical requirements of Claimant's job. Dr. Patel inconsistently found that Claimant could perform some work on a part-time basis, but restricted him from sitting for an 8 hour period, and from traveling for more than ½ hour. The doctor does not correlate her restrictions to Claimant's clinical findings, and I therefore credit Dr. Patel's opinion on this issue with little weight.

I also find that Dr. Patel's opinions are outweighed by other physicians of record who are better qualified. Dr. Patel is not Board-certified, and she does not consider herself a qualified orthopedic surgeon. CX.-11 at 5. Rather, she conducts initial examinations of her patients and then refers them to specialists. CX.-11 at 7. As such, Dr. Patel's qualifications and expertise in this area is limited in contrast with other medical experts of record. I find that Dr. Patel's opinion is entitled to little weight on the issue of whether Claimant is restricted from his longshore employment.

Dr. Vigman relied in part upon Dr. Miller's finding that Claimant exaggerated his symptoms, which I have found to be an unreliable opinion. Although Dr. Vigman testified that his conclusion was based upon medical records, including Dr. Magliato's records, Dr. Magliato was of the opinion that Claimant sustained cervical and lumbar sprains and contusions causally related to his accident that were disabling. At a later date, having reviewed an MRI, Dr. Magliato found evidence of a disc herniation, and concluded that Claimant's lumbar injury was symptomatic. As there is nothing in Dr. Magliato's report to suggest that he found Claimant to be exaggerating symptoms, Dr. Vigman's opinion is undermined by his failure to explain the inconsistency between his findings and Dr. Magliato's.

Moreover, Dr. Vigman specifically concluded that the injuries that Claimant sustained were "bruising and soft tissue strains, and that there was never any injury that would be long lasting." The doctor does not adequately address how that conclusion comports with the MRI evidence of herniation. Dr. Vigman also failed to fully explain his conclusion that an MRI that showed a disc herniation was consistent with degenerative changes related to age, and not attributable to the injury that Claimant sustained.

Dr. Vigman also found no medical reason for Claimant to use a cane, although he did not specifically join Dr. Miller and suggest that Claimant used a cane as a prop. Further, Dr. Vigman testified on cross-examination that he was unable to comment about the opinions of two orthopedics who found Claimant was disabled from an orthopedic perspective. EX.-15 at 40. Claimant maintains in his brief that he is not arguing that he has a neurological disability. Since a neurological disability is not at issue in this case and Dr. Vigman conceded that he cannot give an opinion of Claimant's disability from an orthopedic perspective, I find that the reliability of his ultimate conclusions on the issue of disability are outweighed by the opinions of the orthopedic specialists in this case. When considered with all the evidence of record, I find that Dr. Vigman's opinions are not well documented and are not entitled to significant weight.

Dr. Anant's opinion is conclusory and not well documented, and is confined to an opinion regarding Claimant's neurological condition. I find that it is outweighed by those of the orthopedic specialists and is entitled to little weight.

I find that the record as a whole reflects that the opinions and conclusions of Dr. Kenneth E. Seslowe, M.D., are the most reliable and credible in this case. Dr. Seslowe's records were offered into evidence by each of the parties and his deposition was offered into evidence by the Employer. Dr. Seslowe is a Board-certified orthopedic surgeon whose orthopedic resume is impressive. See EX.-14 at 4. He performed an impartial medical examination of Claimant in response to a request by the DOL. Dr. Seslowe testified that he only interacts with individuals from the DOL and does not interact with anyone representing the employer or carrier. EX.-14 at 5. On his report of March 29, 2004, Dr. Seslowe concluded that Claimant had a mild partial disability which was causally related to the March 29, 2003 accident. CX.-7; EX.-8 at 62. Dr. Seslowe then reported on June 28, 2004, that Claimant "could return to light work. He cannot do heavy lifting of more than forty pounds or frequent bending. He could do lighter type work." CX.-7; EX.-8 at 64. Dr. Seslowe testified that assuming Claimant's job duties do not require him to lift more than forty pounds and do not require frequent bending, he should be able to perform that type of job. EX.-14 at 11. He also testified that Claimant could be on his feet for a full eight hours. EX.-14 at 11. Dr. Seslowe's opinion is buttressed by that of Dr. Marola, who found disability by left radiculopathy.

I find it appropriate to adopt Dr. Seslowe's physical restrictions in my analysis of the extent of Claimant's disability, pursuant to Curit v. Bath Iron Works, supra. No other physician of record set specific exertional limitations due to disability. The second step of that analysis involves a determination of the specific requirements of Claimant's usual employment. The parties are in agreement that Claimant's usual employment at Howland Hook was as a "holdman", but they disagree about the duties and physical demands of that position. Claimant described his usual work duties, and John D. Atkins testified about that job's position description. Not surprisingly, the two witnesses offered widely contrasting accounts of the physical demands of the "holdman" position at Howland Hook. Claimant argues that Mr. Atkins' testimony is unreliable because "Mr. Atkins has no 'hands-on' experience in the Claimant's workplace nor did he have any personal knowledge as to the nature of the Claimant's work duties." CB. at 29. Employer argues that Claimant's testimony is unreliable, specifically citing Claimant's failure to report his 1999 injury to physicians or at his deposition; Claimant's inconsistent pain complaints; and the contention that no doctor believes Claimant has a neck injury.

As reflected by his appearance before me, it cannot be denied that Claimant is a poor historian, but I do not find that alone makes him incredulous. With respect to Claimant's reports of pain that shifted from leg to leg, even Dr. Miller acknowledged that a centrally located herniation could cause pain in both legs, and I accept Dr. Patel's explanation that the pain would not necessarily present itself at all times. Although Dr. Miller attempted to impugn Claimant for using a cane without needing to, and suggested that the cane was akin to a prop, the doctor's notes document that the condition of the cane changed and looked worn in the nine months between the doctor's examinations of Claimant. Although the evidence consistently reflects that any cervical injury that Claimant experienced has resolved, the evidence also consistently

demonstrates that Claimant suffered one. Accordingly, I do not find Claimant's testimony totally unreliable.

I do not find that the record demonstrates that Claimant's complaints are as inconsistent or undocumented as Employer suggests. However, the record reflects that Claimant's symptoms are not entirely consistent with the medical evidence, particularly complaints related to a cervical injury. When considered with Claimant's failure to disclose past injuries to physicians on more than one occasion, the record is sufficient to cast some doubt upon Claimant's testimony about his work duties, which were not well articulated in any event. However, I also cannot credit Mr. Atkins' testimony about the physical exertion involved in working as a holdman, he has no first hand knowledge of how Claimant suffered his injury. In addition, Mr. Atkins described the job as Employer expected it to be performed, which may significantly differ from the actual manner of performance.

Because I am not satisfied that either party's witness has offered a satisfactory explanation of the job duties of a "holdman," I turned to the Dictionary of Occupational Titles ("DOT"), of which I take official notice, to find support for either position. That authority discloses that the strength demands necessary for the average successful worker of the position of DOT code 922.687-090, entitled Stevedore II,[13] is "very heavy work." DOT, 4th Ed. Rev. (1991). The definition of "very heavy work" includes "exerting in excess of…50 pounds of force frequently…" Id. at Appendix C. Since Claimant's testimony of his job requirements is consistent with this assessment of the position, I accord his testimony significant weight on that issue.

Comparing the restrictions set by Dr. Seslowe on lifting and bending, with the exertional demands necessary to work as a "holdman," I am satisfied by a preponderance of the evidence that Claimant cannot return to his normal employment as a "gang holdman." Accordingly, I find that Claimant has established a *prima facie* claim of total disability.

b) Employer's Rebuttal With Suitable Alternative Employment

Once a claimant makes a *prima facie* showing by demonstrating an inability to return to his job because of a work-related injury, he is considered totally disabled within the meaning of the LHWCA and the burden shifts to the employer to prove the availability of suitable alternative employment ("SAE") in the Claimant's community. American Stevedores, Inc. v. Salzano, 538 F.2d 933, 935-36 (2nd Cir. 1976). Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988); Nguyen v. Ebbtide Fabricators, 19 BRBS 142 (1986). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). But if it is established that there are jobs which the claimant can realistically perform and secure, there may not be a finding of total and permanent disability under the LHWCA. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1043 (5th Cir. 1981). The employee's disability is treated as partial, not total. Salzano, 538 F.2d at 73.

Once the burden shifts to the employer, it must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is

[13] I find that this is the DOT code that corresponds to a "holdman" at Howland Hook.

capable of performing considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Turner, 661 F.2d at 1041; See also Salzano, 538 F.2d 933; Hite v. Dresser Guiberson Pumping, 22 BRBS 97 (1989); Young v. Todd Pac. Shipyards, 17 BRBS 201, 203 (1985). In presenting evidence of SAE, the employer is not required to act as an employment agency for the claimant. Turner, 661 F.2d at 1042; Manigault, 22 BRBS at 333.

Employer relied upon certified vocational rehabilitation counselor, Joseph Lopez, to conduct a labor market survey after conducting a vocational assessment interview with Claimant. Mr. Lopez testified that Claimant had a fifth grade level of education and was only capable of performing unskilled, entry level employment. When conducting the labor market survey, Mr. Lopez relied on the physical limitations imposed by Dr. Seslowe. Mr. Lopez identified two positions within Winfield Security in New York City that fit Claimant's vocational profile: concierge and mobile security guard, as well as the following general positions: desk guard, concierge, gate guard, greeter, and lobby attendant. See EX.-9 at 68, 71, 76. Mr. Lopez testified that both of the Winfield positions are classified as sedentary to light work and both pay approximately ten dollars per hour in compensation.

At the outset, it should be noted that Claimant does not challenge Mr. Lopez's credentials or qualifications as an expert on this issue.[14] Also, I find that the bases for Mr. Lopez's opinions, specifically his reliance on the physical restrictions imposed by Dr. Seslowe, are valid and reliable. As I concluded earlier, Dr. Seslowe's medical opinions were the most reliable and so it follows that Mr. Lopez's reliance upon them was adequate and proper. As such, I find that there was a proper foundation laid to establish that Mr. Lopez's testimony and reports in this case are both credible and reliable.

Claimant attacks the sufficiency of Employer's evidence of SAE on numerous grounds. First, Claimant argues that the concierge position is not SAE for him because "it is difficult to imagin[e] this employee engaged in such a position wherein he is required to appropriate[ly] communicate with people, check identification, ascertain that they are properly entered into the log book of the building, and then direct them to appropriate locations." CB. at 31. I do not agree with Claimant's assertions on this matter. On cross-examination, Mr. Lopez described the linguistic skills needed by a concierge: "[t]hey must be able to communicate enough to explain where a particular office is or a resident is within the building." EX.-17 at 28. Claimant testified at the hearing that he understood some English but cannot write it. I personally heard Claimant testify in English at various times during the hearing[15] and he testified at his deposition without an interpreter; a deposition that produced approximately ninety-eight pages of testimony where Claimant spoke English. Furthermore, Claimant has been able to obtain a driver's license in this country, and to sustain employment at Howland Hook for the many years that he was employed there. The job description for the concierge position submitted by Employer states that "Responsibilities include, greeting individuals as they enter the building, checking and issuing passes, providing directions within the building, announcing visitors, and reporting any incidents to the proper authorities or directly to the supervisor by telephone or two way radio." EX.-9 at 68. I am satisfied from this job description and Mr. Lopez's testimony, that Employer has

[14] Nor would Claimant succeed on such a challenge.
[15] Claimant's testimony at the hearing went in and out of English and Italian throughout his testimony.

established that minimal communication skills in English are required of this concierge position at Winfield Security. I am further satisfied that Claimant possesses those minimal skills necessary to attain such employment.

Claimant next challenges the position of mobile security guard as SAE because he asserts that he could not "realistically perform a security function wherein it might be necessary to restrain people." CB. at 32. After review of the record, I find no evidence that suggests that physically restraining someone is a necessary duty of the mobile security guard position. Mr. Lopez was never questioned on that subject and he did not voluntarily include that act as among the duties of the position. The job description of record for that position does not include physically restraining others as a duty of the position. The position of mobile security guard, like that of concierge, is classified as exertionally sedentary to light duty. Without evidence to the contrary, I find that physically restraining someone is not a requirement of the position.

Claimant's third point of contention on the SAE issue is "Mr. Lopez did not pin down the specifics of any of the jobs in this area in terms of how much walking was required as compared to riding in a vehicle." CB. at 32. Counsel for Claimant rigorously questioned Mr. Lopez about the amount of time spent walking in each of the two positions discussed. As demonstrated by the following exchange, Dr. Seslowe did not impose walking restrictions on Claimant:

> Q: What did you conclude [in regards to Claimant's precise work restrictions]?
>
> A: That he should not do any heavy lifting of more than 40 pounds or frequent bending, lifting type work. I feel he could be on his feet for a full eight hours.
>
> Q: Assuming that [Claimant's] job duties do not require him to lift more than 40 pounds and do not require frequent bending, he would be able to do that job?
>
> A: I feel he should yes.

EX.-14 at 11. Dr. Seslowe affirmatively stated that Claimant could be on his feet for a full eight hours and did not restrict him from walking. As I have adopted Dr. Seslowe's restrictions, I find that Claimant may perform jobs that involve standing and walking.

Although I find little support for Dr. Patel's restrictions on Claimant's ability to sit and travel, I nevertheless note that Mr. Joseph described the concierge job in particular as allowing an individual to sit and stand at will, which would meet Dr. Patel's sitting restriction. In addition, Mr. Joseph testified that security jobs were available at different locations which could meet Claimant's transportation needs. Moreover, part-time positions were available in that job, which would address another of Dr. Patel's concerns.

Claimant invokes two cases in support of his final challenge of Employer's evidence of SAE. Both cases stand for the proposition that Employer's evidence of SAE must "establish the

precise nature and terms of the job opportunities." Rieche v. Tracor Marine, Inc., 16 BRBS 272, 274 (1984); Daniele v. Bromfield Corp., 11 BRBS 801, 805 (1980) [emphasis added]. Claimant argues that Employer's labor market survey does not meet this requirement.[16] CB. at 32. I disagree. The labor market survey conducted by Mr. Lopez is precise in its nature and terms and identifies specific available jobs. Mr. Lopez contacted Mr. Roy Thorpe, manager of Winfield Security located in Manhattan, New York. EX.-9 at 66. Mr. Thorpe related to Mr. Lopez that his company hired security guards within the five boroughs of New York City and also explained that he currently had positions available for mobile security guards and he was also in need of a concierge. EX.-9 at 66. The job analysis for the available concierge position submitted by Employer lists a description of the position, its pay rate of $10 an hour, the fact that it is for forty hours a week, and lists that the normal working hours are from 9 a.m. to 5 p.m. with flexible weekend schedules. EX.-9 at 68. Likewise, the job analysis for the available mobile security guard positions list a description of the position, its pay rate of $10 an hour, and the fact that full and part-time work is available. EX.-9 at 71. Mr. Lopez also inquired into Mr. Thorpe's ability to hire disabled workers and it was determined that that was not an issue with Winfield Security. EX.-17 at 41.

The evidence offered by Employer establishes 1) the availability of the positions, 2) the availability of the positions for disabled workers, 3) the pay rate of the positions, 4) the amount of hours required of each position, 5) the location of the positions, and 6) descriptions of the nature of the positions. I find it sufficiently sets forth the nature and terms of the positions identified by Employer as appropriate for SAE. As the cited precedent dictates, "it is not necessary for employer to actually find employment for Claimant in order to meet its burden." Daniele, 11 BRBS at 804-805. What is necessary is that "the employer is required to establish the availability of jobs which Claimant could reasonably secure had he diligently tried." Rieche, 16 BRBS at 274 (citing Turner, 66 F.2d 1031). I am satisfied that Employer has carried its burden of establishing the availability of jobs which the Claimant could reasonably secure. Consequently, I find that Employer has established sufficient evidence of suitable alternative employment.

Mr. Atkins also described the physical demands required of the job of driving a hustler, which Claimant had performed during his years of employment with Employer. Tr. at 86-88. If Claimant wanted to only work as a forklift driver when he did warehouse work, Mr. Atkins testified that Howland Hook would allow him to do so. Tr. at 86. That position includes no heavy lifting or frequent bending. Tr. at 86-88. Mr. Atkins also testified that jobs are filled according to contract with the International Longshore Association and New York Shipping Association, and not by direct hire by Employer. Tr. at 94-103. I find that the record is insufficient to establish that Claimant has the physical capacity to perform the work of a hustler driver. In addition, the evidence does not sufficiently demonstrate that the position would be available for him under the terms of the union contract. Therefore, I am unable to find that hustler driver constitutes SAE.

[16] It is difficult to ascertain from Claimant's brief what his actual points of contention are in regards to the precise nature of the job opportunities offered by Employer. The sentence on lines 12-14 on page 32 of Claimant's brief ("By the same…") makes no sense at all.

Accordingly, for the reasons discussed above, I find that Claimant is not totally disabled but rather that he is partially disabled, and retains an earning capacity of $400.00 per week.

c) Claimant's Rebuttal with Diligent Efforts to Find Work

If an employer rebuts the claimant's *prima facie* claim of total disability with a showing of suitable alternative employment ("SAE"), the injured employee can rebut the employer's showing of SAE by showing diligent efforts to find work. Palombo, 937 F.2d at 73; see also Dove v. Southwest Marine of San Francisco, Inc., 18 BRBS 139, 141 (1986). In proving diligence, the claimant must establish that he was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." Palombo, 937 F.2d at 74 (quoting Turner, 661 F.2d at 1043).

Claimant has not met his burden under this prong of the analysis. Claimant has offered some evidence of pursuit of alternate employment in the form of three rejection letters from Verga Mechanical Corp. (dated July 23, 2004), M&L Ceramic Tile & Marble (dated July 22, 2004), and Verrazano Tile & Granite (dated July 24, 2004). CX.-8. This evidence suggests that Claimant looked for alternate employment over the course of less than one week, as it shows that he received three rejection letters in the course of three days. I agree with Mr. Lopez that this does not equate with a diligent job search. EX.-17 at 19. Furthermore, the letters provide little evidence of the type of employment and physical demands involved in the work that Claimant sought. However, as Claimant has argued that he could not perform the SAE identified by Employer, I infer that none of the three companies whose rejection letters were submitted appear are "within the compass" of the suitable alternative employment established by Employer. I find that Employer's evidence of SAE has not been rebutted.

2. Nature of the Disability [Temporary or Permanent] Analysis

Following Claimant's work-related accident on March 29, 2003, Employer/Carrier paid Claimant total temporary disability benefits from March 31, 2003, through June 30, 2004. Claimant now asserts that his disability is permanent in nature as opposed to temporary.

An injured worker's impairment may be found to have changed from temporary to permanent under either one of two tests. Eckley v. Fibrex & Shipping Co., 21 BRBS 120, 122-23 (1988). Under the Board's primary test, a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement ("MMI"). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988); Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56, 60 (1985). Thus, an irreversible condition is permanent *per se*. Drake v. General Dynamics Corp., Elec. Boat Div., 11 BRBS 288, 290 n.2 (1979). The date of the diagnosis of an irreversible medical condition is the date of permanency. Crouse v. Bath Iron Works Corp., 33 BRBS 442 (ALJ)(May 4, 1999). The date on which a claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. Trask, 17 BRBS at 60.

Dr. Seslowe, whose opinions and conclusions I have credited as the most reliable in this case, diagnosed Claimant with lumbosacral sprain and left-sided sciatica. Dr. Seslowe opined that this diagnosis caused Claimant to suffer from a mild partial disability. EX.-8 at 62; EX.-14 at 9. Dr. Merola concurred that Claimant has left sided radiculopathy that would impose a partial disability. Dr. Magliato would have expected a strain to have resolved, but noted that Claimant's lumbar injury was symptomatic when he examined Claimant on 6/19/03. On Dr. Seslowe's supplemental report dated April 23, 2004, Dr. Seslowe reported that Claimant was not responding to physiotherapy and that if Claimant did not want any surgery to remove the herniated disc, it was Dr. Seslowe's opinion that no further treatment was recommended. EX.-8 at 63; EX.-14 at 9-10. Although the evidence also reflects that Claimant refused to undergo epidural injections that both Dr. Seslowe and Dr. Merola recommended, I make no negative inference about Claimant's condition due to his refusal to engage in invasive medical treatment.

In light of the preponderance of the creditable medical evidence, I find that Claimant's disability is irreversible. I find that Claimant's disability is permanent and the date of maximum medical improvement (MMI) and permanency is April 23, 2004, the date on which Dr. Seslowe reported that if Claimant refused surgery, no further treatment was recommended.

3. Determination of Permanent Partial Disability Benefits

For the reasons set out above, I find that Claimant is permanently and partially disabled. Partial disability status commences on the earliest date that the employer shows suitable alternative employment to be available. Palombo, 937 F.2d at 77. Claimant is entitled to total disability benefits until that date. Id.

Here, Employer terminated payment of temporary total disability benefits on June 30, 2004. The earliest date that Employer established suitable alternative employment was one day earlier, on June 29, 2004, when Mr. Lopez concluded that the positions he found through Winfield Security of "desk guard, concierge, gate guard, greeter, and lobby attendant" were appropriate suitable alternative employment opportunities. EX.-9 at 76. Therefore, there is no period of time where Claimant was eligible for permanent total disability benefits.

The proper determination of benefits in this case is in accordance with Section 8(c)(21) of the LHWCA which states:

> (c) Permanent partial disability:
>
> (21) Other cases: In all other cases in the class of disability, the compensation shall be $66^{2/3}$ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21).

The positions established by Employer as suitable alternative employment each pay $10 per hour for 40 hours a week. Thus, Claimant retains the capacity to earn $400.00 a week, and is entitled to permanent partial disability benefits in the amount of $66^{2/3}$ per centum of his average weekly wage, adjusted for his retained earning capacity, in consideration of the maximum compensation rate pursuant to § 6(b)(1) of the Act.

4. Employer's Entitlement to Special Fund Relief Under Section 8(f)

To be entitled to special fund relief under Section 8(f) of the LHWCA if the claimant is permanently and partially disabled, the employer must establish that (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing permanent partial disability was manifest to the employer prior to the employment injury, (3) the current disability is not due solely to the employment injury, Director, OWCP v. General Dynamics Corp., 982 F.2d 790, 793 (2d Cir. 1992); Director, OWCP v. Luccitelli, 964 F.2d 1303, 1305, 1306 (2d Cir. 1992), and the current permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884, 886 (5th Cir. 1997); 33 U.S.C. § 908(f)(1).

In the instant case, the Department of Labor was notified of the hearing, and did not appear, nor has it offered any evidence or made any argument in opposition to Employer's request for Special Fund relief.

a) Pre-Existing Permanent Partial Disability

In order to establish a pre-existing permanent partial disability, the employer's evidence need only indicate "the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge [or to decline to hire] the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977). Further, "Section 8(f) is to be read broadly, and this provision thus may encompass persons who are 'disabled' but who do not meet the standards of 'disability' set forth in other statutory schemes." Preziosi v. Controlled Indus., 22 BRBS 468, 473 (1989).

I find that the medical records submitted by Employer of Claimant's January 1999 accident establish the first prong of the Section 8(f) analysis. See EX.-12. Dr. Miller's report dated February 10, 1999, establishes that Claimant suffered a "total temporary disability" because of "lumbo-sacral strain and sprain" caused by Claimant's work-related accident on January 12, 1999. EX.-12 at 117. Even though Dr. Miller's report dated April 7, 1999, disclosed his opinion that "there is no permanency to the claimant's injury to the lumbo-sacral spine," EX.-12 at 121, the MRI conducted on July 30, 1999, revealed that Claimant had "minimal annular bulging at L4-5." EX.-12 at 124. Chronic back pain and disc disease have been held to constitute sufficient pre-existing disabilities for purposes of Section 8(f). See Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991). I find that Claimant's annular bulge at L4-5 is a pre-existing disability for purposes of Section 8(f). See, e.g., Greene v. J.O. Hartman Meats, 21 BRBS 214, 217 (1988).

b) The "Manifest" Requirement

The evidence in this case clearly indicates that the pre-existing disability was manifest to the employer. The existence of medical records establishing the pre-existing permanent partial disability is sufficient to meet the "manifest" requirement. Director, OWCP v. Universal Terminal Stevedoring (De Nichilo), 575 F.2d 452, 454-57, 8 BRBS 498 (3d Cir. 1978). In this case, the MRI of July 30, 1999, establishes that Claimant suffered from a bulging disc at L4-5. EX.-12 at 124. In addition, Claimant filed a claim against Employer concerning the January 12, 1999 injury which was eventually settled after formal proceedings were initiated. EX.-12. For these reasons, I find that it is clear that the evidence in this case meets the "manifest" requirement of the Section 8(f) analysis.

c) Current Disability Not Due Solely To the Current Injury

In the case of permanent partial disability, all the employer must show to meet the "not due solely" requirement is that an increased permanent partial disability results when the injuries from the prior and subsequent injuries are combined. Whenever the disability is increased from the combination of the two injuries, the resulting permanent partial disability is necessarily "not due solely" to the subsequent injury. Director, OWCP v. Ingalls Shipbuilding, Inc., 125 F.3d 303, 307 (5th Cir. 1997).

In an addendum to his deposition, Dr. Seslowe notes that the MRI conducted on July 30, 1999, indicated mild annular bulge at the L4-5 level and that the MRI conducted on July 10, 2003, indicated a disc herniation at the L4-5 level. EX.-14 at Addendum. The doctor then opined that "there is a distinct possibility that the injury to his back in 1999 caused the weakness in the area of the L4-5 disc, which progressed to a frank herniation." Dr. Seslowe concluded "that [Claimant's] disability is materially and substantially greater due to the 1999 accident then it would have been from the March 29, 2003 accident alone." Id. I find that Dr. Seslowe's opinion is both credible and reliable. Therefore, I find that his report satisfies Employer's burden under the final two prongs of the Section 8(f) analysis.

Accordingly, I find that for the reasons discussed above, Employer/Carrier has established its entitlement to special fund relief under Section 8(f) of the LHWCA.

5. Attorney's Fees

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against Employer. Within fourteen days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have ten days to comment thereon. The postmark shall determine the timeliness of any filing. I will consider only those legal services rendered after the date of referral to this office. Services performed prior to that date should be submitted to the District Director OWCP for consideration.

III. CONCLUSION

Based upon the foregoing, I find that the medical evidence has established that Claimant suffers from a disability of his back that was causally related to a work-related accident at Howland Hook on March 29, 2003, and that became permanent in nature on April 23, 2004. Although Claimant successfully established a *prima facie* claim for total disability benefits, Employer successfully rebutted that claim with evidence of suitable alternative employment. Accordingly, I find that Claimant is entitled to permanent partial disability benefits and that Employer is entitled to Section 8(f) special fund relief.

ORDER

(1) Employer/Carrier shall pay the following, to be computed based on Claimant's average weekly wage of $2,359.96 and an alternate earning capacity of $400.00 per week, subject to the provisions regarding maximum compensation set forth at § 6(b)(1) of the Act:

(a) Permanent partial disability benefits commencing upon the termination of temporary total disability payments on June 30, 2004, and continuing.

(b) Interest on such compensation until fully paid calculated at the rates specified in title 28 U.S.C. §1961.

(c) Claimant's attorney's fees, to be established upon petition by counsel and in supplemental Order.

(2) Employer is entitled to a credit for any benefits paid in relation to Claimant's claim.

(3) Pursuant to § 7 of the Act, Employer shall pay all medical expenses consistent with this decision.

(4) Employer's claim for Special Fund relief is hereby AWARDED.

(5) Claimant's attorney may make application for fees and costs as appropriate under the Act, and is directed to attempt to resolve with opposing counsel any dispute concerning attorney's fees.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey